

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

FILED

APR 08 2015


CLERK

JUSTIN BIRDHORSE,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

1:15-CV-1018-CBK

ORDER DENYING
CERTIFICATE OF APPEALABILITY

TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

Petitioner filed a petition for a writ of error coram nobis seeking to vacate his federal sexual abuse conviction and 276 month sentence. I denied the petition because petitioner is not entitled to challenge his conviction and sentence through a writ of error coram nobis. Petitioner has filed a notice of appeal. "A certificate of appealability is required to appeal the denial of any motion that effectively or ultimately seeks habeas corpus or § 2255 relief." United States v. Lambros, 404 F.3d 10345, 1036 (8th Cir. 2005).

Pursuant to 28 U.S.C. § 2253, a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right.

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. This construction gives meaning to Congress' requirement that a prisoner demonstrate substantial underlying constitutional claims and is in conformity with the meaning of the "substantial showing" standard . . . Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000) (emphasis supplied). Petitioner did not and has not made a substantial showing that jurists of reason would find it debatable whether the petition for a writ of coram nobis should have been denied.

IT IS HEREBY CERTIFIED that there does not exist probable cause of an appealable issue with respect to the Court's order denying petitioner's petition for a writ of coram nobis. Petitioner's application for a certificate of appealability is denied. This in no way hampers the petitioner's ability to request issuance of the certificate by a circuit judge pursuant to Fed. R. App. P. 22.

Now, therefore,

IT IS ORDERED that the petition for a writ of error coram nobis is denied.

DATED this 5th day of April, 2015.

BY THE COURT:



CHARLES B. KORNMANN
United States District Judge